ORIGINAL

JAMES J. BROSNAHAN (Bar No. 34555)
MARK W. DANIS (Bar No. 147948)
MARIA CHEDID (Bar No. 187396)
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: (415) 268-7000

SHIRLEY M. HUFSTEDLER (Bar No. 21422)
MORRISON & FOERSTER LLP
555 West Fifth St., Suite 3500
Los Angeles, California 90013-1024
Telephone: (213)892-5200

Attorneys for Respondent
JUSTICE J. ANTHONY KLINE

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING JUSTICE J. ANTHONY KLINE, No. 151.	VERIFIED ANSWER

To: Robert C. Bonner
Chairperson, Commission on Judicial Performance
101 Howard Street, Suite 300
San Francisco, CA 94105

Respondent, the HONORABLE J. ANTHONY KLINE, Presiding Justice of the California Court of Appeal, First Appellate District, Division Two, requests that the hearing of this matter be conducted publicly pursuant to the Constitution of the State of California, article VI, section 18(j) and Rule 102(b) of the Commission on Judicial Performance, and answers the charges of the Commission on Judicial Performance as follows:

1. Respondent denies that he is guilty of "willful misconduct in office, conduct prejudicial to the administration of justice that brings the judicial office into disrepute,

improper action and dereliction of duty within the meaning of article VI, section 18 of the California Constitution" or a violation of Canons 2A or 3B(2) of the Code of Judicial Ethics. (Notice of Formal Proceedings, pp. 1-2.)

2. Respondent is aware of no reported case in which an American appellate judge has been disciplined for stating in a dissenting opinion principled reasons for declining to follow a prior decision. In subjecting Respondent to disciplinary proceedings based solely on his dissenting opinion in *Morrow v. Hood Communications, Inc.* (1997) 59 Cal.App.4th 924, 926, the Commission has apparently misapprehended the doctrine of *stare decisis*, failed to recognize the vital difference between a decision of an appellate court and a dissenting appellate opinion, and overlooked the important and honorable role dissenting opinions have played in shaping the law of the United States.

3. A principle of law established in a different and prior case will affect later cases in the same court or in lower courts in the same judicial hierarchy only upon application of the doctrine of *stare decisis*. Under that doctrine, once a point of law has been established by an appellate court, that point will ordinarily be followed by the same court and by all courts of lower rank in the same judicial system when the factual context in the later case is the same as that in which the prior issue of law was necessarily decided. S*tare decisis* is a principle of policy and not a mechanical formula compelling adherence to the latest decision. (*Cianci v. Superior Court* (1985) 40 Cal.3d 903, 923-924.) *Stare decisis* applies to courts of last resort as well as to inferior courts in the same judicial structure. (*People v. Derek Latimer* (1993) 5 Cal.4th 1203, 1212-1213.) *Stare decisis* does not necessarily compel an inferior court to acquiesce in the decision of a superior court. *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450 does not hold otherwise.

4. Dissenting opinions have no impact on the parties. Although dissenting opinions have no immediate effect on any of the parties, dissenters hope that their views will ultimately be vindicated by a higher court, by the Legislature, or by later courts that will become convinced that the dissenter's views were correct and will thereupon change the law.

Dissenting opinions have always been important in the development of American jurisprudence.

5. Because the California Supreme Court has not had any occasion to discuss any possible impact of *stare decisis* on the views expressed by an appellate justice in a dissenting opinion, and has never expressed any view on the doctrine of non-acquiescence invoked by Respondent in his dissent, that Court has not foreclosed Respondent from expressing his views as he did in *Morrow*, nor even intimated the impropriety of such an expression.

6. Respondent's reasoned dissent does not constitute lack of compliance with law (Canon 2A) nor lack of faithfulness to the law (Canon 3B(2)). Like the doctrine of *stare decisis*, the Canons apply to Supreme Court justices as well as to judges of an intermediate appellate court. No one, heretofore, has ever suggested that a Supreme Court justice's dissenting opinion disagreeing with a prior Supreme Court decision, nor a lower appellate jurist's doing so, evidences lack of faithful adherence to the law. To the contrary, dissenting opinions by Supreme Court justices and by lower court appellate jurists are a time-honored way to improve the law. In fact, dissenting opinions are often cited by lower court opinions for the value of the views they express.

7. Respondent's dissent expresses his firmly held belief that the doctrine for which *Neary v. Regents of the University of California* (1992) 3 Cal.4th 273 stands — which permits a party with the necessary economic means to purchase the reversal of an adverse judgment not shown to be erroneous — undermines the integrity of the judicial branch of state government. As stated by the Respondent in his dissent, "'[j]udicial decisions are not for sale'" (citations omitted). For these reasons, Respondent believed that his dissent was not only proper, but, indeed, required, in order to faithfully discharge his duty under Canon 1 of the California Code of Judicial Ethics to "uphold the integrity and independence of the judiciary."

8. Accordingly, Respondent dissented in order to preserve the *Morrow* case as a vehicle for the Supreme Court to reconsider its holding in *Neary* that "as a general rule

parties are entitled to a stipulated reversal by the Court of Appeal absent a showing of extraordinary circumstances that warrant an exception." (*Neary, supra*, 3 Cal.4th at 275.) Under the peculiar circumstances presented in motions for stipulated reversal, no party would be motivated to petition the Supreme Court for review unless the motion were denied. By filing his dissent, Respondent called attention to this structural impediment to reconsideration by the Supreme Court and enhanced the possibility that the Supreme Court might exercise its power to take the case *sua sponte*. Although the Supreme Court did not take the case, it also did not find it necessary to order Respondent's opinion depublished.

9. Respondent had reasonable grounds for his good faith belief that the Supreme Court might wish to reconsider its decision in *Neary*. The U.S. Supreme Court unanimously repudiated the doctrine of stipulated reversal subsequent to the *Neary* decision. Moreover, Respondent is aware of no other jurisdiction in this Nation that employs the doctrine of stipulated reversal.

10. The Supreme Court might someday decide to impose a limitation on what appellate jurists can properly say in dissenting opinions, but it has not done so, and it is highly unlikely it will ever do so.

11. The Court may also someday decide that the doctrine of non-acquiescence does not apply in California, but to date it has not done that either. In fact, existing precedent indicates that the opposite is true. In *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, Judge Arabian, then a Los Angeles County Superior Court judge, refused to deliver a Supreme Court approved compulsory cautionary instruction to the jury in a rape case because it was outmoded and demeaning to the female victim. Judge Arabian's "non-acquiescence" led the Court to rewrite the offensive instruction, stating that the trial court's error in failing to follow precedent was non-prejudicial.

12. Similarly, in *Benavides v. Jackson National Life Ins. Co.* (D.Colo. 1993) 820 F.Supp. 1284, in a factual context resembling *Neary*, the Tenth Circuit ordered the district court to vacate a prior judgment. In an act of non-acquiescence, Chief Judge Finesilver of

the district court stated: "[W]e must respectfully decline to vacate our prior judgment pending a reasoned and more detailed order from the court of appeals." Judge Finesilver was never criticized for his refusal to acquiesce. Indeed, presumably influenced by his views, the Tenth Circuit subsequently repudiated the ruling Judge Finesilver refused to follow. (*See Oklahoma Radio Ass'n v. FDIC* (10th Cir. 1993) 3 F.3d 1436.)

13. For all the aforementioned reasons, Respondent wrote his dissenting opinion with the good faith belief that he was acting within his judicial authority, and he did so.

14. Respondent cannot be guilty of "willful misconduct." As defined by the Supreme Court of California, "willful misconduct" requires proof that a judge has engaged in conduct that (1) is unjudicial, (2) in bad faith, (3) while acting in a judicial capacity. (*Broadman v. Commission on Judicial Performance,* No. S055684, 1998 Cal. LEXIS 4830 (Cal. S. Ct., Aug. 10, 1998); *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294; *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163.) The Supreme Court has made crystal clear that a judge cannot be charged with "bad faith" because he was negligent in committing an act that he "should have known" was beyond his or her lawful authority. (*Broadman, supra*, 1998 Cal. LEXIS 4830 at *10; *Gubler v. Commission on Judicial Performance* (1984) 37 Cal.3d 27, 46, fn. 7. *See also Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 796.)

15. First, based on 200 years of American jurisprudence, Respondent's dissenting opinion could not constitute "unjudicial" conduct. Second, Respondent did not act in bad faith because he did not act with "reckless or utter indifference to whether judicial acts being performed exceed the bounds of the judge's prescribed power." (*Broadman, supra*, 1998 Cal. LEXIS 4830 at *12.) No reported case has ever even suggested that an appellate jurist's filing a dissenting opinion and urging reconsideration by a higher Court is outside an appellate jurist's judicial authority. The right of an appellate jurist to express an opinion contrary to an existing higher court precedent or precedent within the dissenting jurist's own court has been accepted as appropriate in California and elsewhere in the United States since

the earliest days of the Republic. Third, because Respondent was unquestionably acting in a judicial capacity (although he was not acting as the appellate court), the third element of willful misconduct is not in issue.

16. Nor can Respondent be guilty of "prejudicial conduct." Prejudicial conduct has been defined by the California Supreme Court as "'conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office.'" (*Doan, supra,* 11 Cal.4th at 312.) Respondent's dissent was not "unjudicial" or "prejudicial to the public esteem," nor did it bring "the judicial office into disrepute." Dissenting opinions—even those that have been sharply worded—have not yet brought any appellate court into disrepute. Public concern about the esoteric reversal procedure approved by a majority of the California Supreme Court in *Neary* is at this time virtually non-existent. Although hotly debated by legal scholars, the non-acquiescence doctrine has not made the slightest blip on anyone else's esteem screen.

17. Respondent's conscientious refusal "to apply the *Neary* rule when asked to do so by litigants" (*Morrow, supra*, 59 Cal.App.4th at 930), which he believes is required by his oath of office and, more particularly, his ethical responsibility to uphold the integrity and independence of the judiciary (Code of Judicial Ethics, Canon 1), will not prejudice any future party. Consistent with his stated refusal to continue to participate in the stipulated reversal of presumptively correct trial court judgments, Respondent has recused himself from all cases that have come before him since the issuance of his dissent in *Morrow* in which a motion for stipulated reversal has been filed. Such motions have been and will continue to be ruled upon by the three associate justices in Division Two of the First Appellate District without prejudice to the parties.

18. Respondent's dissent in *Morrow* no more brought the appellate court nor his own judicial office into disrepute than did Justice Kennard's dissent in *Neary* subject her office or the Supreme Court itself to a diminution of public esteem.

19. For all the same reasons, Respondent cannot be guilty of "improper action or dereliction of duty" within the meaning of article VI, section 18 of the California Constitution.

20. By proceeding against Respondent, the Commission has exceeded its authority as it is interfering with a judicial function. Respondent's actions in the *Morrow* case are subject to official reproval only by the California Supreme Court. This is, in part, the reason for our multi-tiered judicial system. At most, Respondent's actions constitute legal error. Mere legal error committed in good faith is properly addressed on appeal, not through misconduct proceedings. The Commission itself has recognized this in its 1997 Annual Report ("Overview of the Complaint Process", p. 1):

> The Commission is not an appellate court. The Commission cannot change the decision of any judge. When a court makes an incorrect decision or misapplies the law, the ruling can be changed only through appeal by the appropriate reviewing court.

21. A system permitting an agency of the executive branch of government to punish a member of the judicial branch for the respectful expression of legal views in a judicial opinion would not allow breathing room for ideas that in the future may be embraced, although they are not, at the moment, accepted. This is one way that the law grows and flourishes. An attempt to discipline a jurist for expressing ideas in a dissenting opinion poses a clear danger to the vitality of the California judiciary and should be met with the gravest concern by all those who value judicial independence.

22. Respondent calls upon the Commission to dismiss these proceedings, not only for his benefit, but for the health of the judicial branch and our tripartite form of government. The Commission's charges can only be seen by sitting judges as a deterrent to their free expression. It is doubtful the Commission intended this chilling effect, but it is inevitable. It is not possible or advisable to single out one individual, at least in this manner, without silencing or stunting the robust thought and expression of many.

23. There are times when the right thing to do is to take a different course than that initially contemplated. This is such a time for the Commission. Accordingly, Respondent requests that the Commission voluntarily dismiss these proceedings forthwith.

CHARGES

24. Respondent admits to authoring a dissenting opinion in *Morrow,* in which Respondent stated he would not grant the parties' motion for stipulated reversal of the judgment of the trial court and that he would no longer participate in cases in which such motions are filed.

25. Respondent admits to writing in such dissenting opinion that he would refuse to apply the rule in *Neary*, when asked to do so by litigants, but would comply with an order to do so from the California Supreme Court. Respondent wrote this statement in the belief that only by doing so could he faithfully discharge his judicial duties. Subsequently, Respondent has recused himself in the only two cases that have come before him involving a request for stipulated reversal (*McKee v. Mahoney* A081948 and *Lillard v. Discovery Bay Marina Properties* A082430).

26. Respondent denies engaging in unjudicial conduct. Respondent further denies that he performed any judicial act for a corrupt purpose, performed any judicial act with knowledge that such act was beyond his lawful judicial power, or performed any judicial act that exceeded his lawful power with a conscious disregard for the limits of his authority. Respondent at all times acted in good faith to properly discharge his judicial duties. Respondent authored the dissent in question only after a detailed examination and explanation of the reasons for not acquiescing to the rule announced by the Supreme Court in *Neary* and after considering the judicial precedent and other authority supporting such non-acquiescence. The California Supreme Court has not had any occasion to express any view on the doctrine of non-acquiescence invoked by Respondent in his dissent.

27. Respondent denies committing any act in a judicial capacity which would appear to an objective observer to be either unjudicial or prejudicial to public esteem for the judicial office. As Respondent states in his dissenting opinion, his refusal to acquiesce "is not designed to offend our Supreme Court, for which [he] [has] the most profound respect." Respondent further denies engaging in any improper action or dereliction of duty. Respondent authored the dissenting opinion with the good faith belief that the majority's act of granting the motion for stipulated reversal of the judgment of the trial court would in fact undermine public respect for California's judicial institutions.

28. Respondent denies violating Canon 2(A) of the California Code of Judicial Ethics by acting in a manner that undermines public confidence in the integrity and impartiality of the judiciary. Respondent further denies violating Canon 3(B)(2) by acting in a manner unfaithful to the law. Even if Respondent's understanding of the doctrine of non-acquiescence is in the future determined to be incorrect by the California Supreme Court, Respondent's dissent, and the views therein expressed, cannot constitute a violation of the Code. "A judicial decision or administrative act later determined to be incorrect legally is not in itself a violation of this Code." (California Code of Judicial Ethics, Canon 1.)

FIRST AFFIRMATIVE DEFENSE

29. That the acts complained of by the Commission, at most, constitute legal error made by the Respondent in good faith in furtherance of performing his duties as an appellate jurist. Respondent may not be disciplined for that which is subsequently determined to be mere legal error.

SECOND AFFIRMATIVE DEFENSE

30. That the Commission's proceedings against the Respondent violate the separation of powers under the California Constitution, article VI, section 1, by extending beyond the Comission's authority and interfering with a purely judicial function.

THIRD AFFIRMATIVE DEFENSE

31. That the Commission's action exceeds the subject matter jurisdiction of the Commission on Judicial Performance. That any disciplinary charges made by the Commission against Respondent for stating in a dissenting opinion principled reasons for declining to follow a prior decision threatens the independence of the California judiciary by chilling its judicial duty to make legal determinations even when such judgments prove incorrect or are unpopular to the political branches of government.

FOURTH AFFIRMATIVE DEFENSE

32. That the acts complained of by the Commission constituted Respondent's lawful exercise of his constitutional right to freedom of speech.

FIFTH AFFIRMATIVE DEFENSE

33. That the basis of the Commission's charges are unconstitutionally vague and violate the due process and equal protection guarantees of the constitutions of the State of California and of the United States.

SIXTH AFFIRMATIVE DEFENSE

34. That Respondent at all material times believed that he was required to carry out the acts complained of by the Commission in order to comply with Canon 1 of the California Code of Judicial Ethics, which requires a judge to "uphold the integrity and independence of the judiciary"; with Canon 2(A), which requires a judge to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"; and with Canon 3(B)(2), which requires a judge to "be faithful to the law regardless of partisan interests, public clamor, or fear of criticism . . . ." His belief was and is correct.

SEVENTH AFFIRMATIVE DEFENSE

35. That respondent dissented under unique circumstances which mandated such action. Respondent believed his refusal to grant the motion for stipulated reversal was

constitutionally justified. Because a stipulated reversal of a trial court judgment must be jointly sought and the granting of such a motion will not result in a petition for review, the propriety of the doctrine announced in *Neary* will not likely be presented for reconsideration by the California Supreme Court.

EIGHTH AFFIRMATIVE DEFENSE

36. These proceedings are in violation of Respondent's guarantees of due process specified in California Rules of Court Rule 904.2 in that the Commission failed to provide the name of any person making a verified statement regarding any allegation of wrongdoing by Respondent, or alternatively, that the investigation was commenced on the Commission's own motion, to allow Respondent to be afforded a reasonable opportunity to present matters in opposition. The process of the Commission further violates Respondent's due process guarantees because of lack of substantial procedural safeguards available to the Respondent.

Dated: September 4, 1998

MORRISON & FOERSTER LLP

By: _____
James J. Brosnahan

Attorneys for Respondent
PRESIDING JUSTICE J. ANTHONY KLINE

VERIFICATION

I, Justice J. Anthony Kline, say as follows:

I am Respondent in this matter. I have read the Verified Answer and know the contents thereof, and the same is true to the best of my knowledge, information, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification is executed on September 4th, 1998, at San Francisco, California.

Justice J. Anthony Kline

PROOF OF PERSONAL SERVICE

I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California, 94105; I am not a party to the within cause; I am over the age of eighteen years and I am readily familiar with Morrison & Foerster's practice for the collection and processing of documents for hand delivery and know that in the ordinary course of Morrison & Foerster's business practice the document(s) described below will be taken from Morrison & Foerster's mailroom and hand delivered to the document's addressee (or left with an employee or person in charge of the addressee's office) on the same date that it is placed at Morrison & Foerster's mailroom.

I further declare that on the date hereof I served a copy of:

VERIFIED ANSWER

on the following by placing a true copy thereof enclosed in a sealed envelope addressed as follows for collection and delivery at the mailroom of Morrison & Foerster LLP, 425 Market Street, San Francisco, California, 94105, in accordance with Morrison & Foerster's ordinary business practices:

Jack Coyle, Esq.
William Smith, Esq.
Office of Trial Counsel
Commission on Judicial Performance
101 Howard Street, Suite 320
San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at San Francisco, California, this 4th day of September, 1998.

Barbara Johnston
(typed)

Barbara Johnston
(signature)

sf-567515